

Case 3:08-cv-00543-IEG -BGS

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11 Attorneys for Defendant and Counterclaimant HTC CORPORATION

12 **UNITED STATES DISTRICT COURT**  
 13 **SOUTHERN DISTRICT OF CALIFORNIA**

14  
 15 DATAQUILL LIMITED,

16 Plaintiff,

17 v.

18 HIGH TECH COMPUTER CORP.,

19 Defendant.

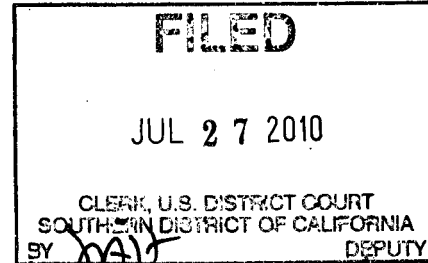
20  
 21 HTC CORPORATION,

22 Counterclaimant,

23 v.

24 DATAQUILL LIMITED,

25 Counterdefendant.



Case No. 08cv543 IEG (BGS)

**HTC CORPORATION'S FIRST  
 AMENDED ANSWER,  
 AFFIRMATIVE DEFENSES, AND  
 COUNTERCLAIMS**

**DEMAND FOR JURY TRIAL**

Complaint Filed: March 25, 2008

Judge: Hon. Irma E. Gonzalez

Magistrate  
 Judge: Hon. Bernard G. Skomal

Trial Date: Not Set

1 Defendant HTC Corporation ("HTC"), formerly known as High Tech Computer Corporation,  
2 files the following first amended answer, affirmative defenses, and counterclaims in response to  
3 Plaintiff DataQuill Limited's ("DataQuill's") Complaint for Patent Infringement ("Complaint").

4 **ANSWERS TO DATAQUILL'S ALLEGATIONS OF PATENT INFRINGEMENT**

5 HTC answers the allegations in the separately numbered paragraphs of DataQuill's  
6 Complaint as follows:

7 1. HTC admits that this Court has subject matter jurisdiction over the present action.  
8 HTC denies all other allegations of Paragraph 1.

9 2. HTC admits that on May 2, 2000, United States Patent No. 6,058,304 ("the '304  
10 patent") was issued by the United States Patent and Trademark Office and that the '304 patent is  
11 entitled "Data Entry System." HTC also admits that on Nov. 21, 2006, United States Patent No.  
12 7,139,591 ("the '591 patent") was issued by the United States Patent and Trademark Office and that  
13 the '591 patent is entitled "Hand Held Telecommunications and Data Entry Device." HTC is  
14 without sufficient information to form a belief as to the truth or falsity of the remaining allegations  
15 of Paragraph 2 and therefore denies same.

16 3. With regard to the allegations of Paragraph 3, HTC -- formerly known as High Tech  
17 Computer Corp. -- admits it is organized under the laws of the Republic of China. HTC denies its  
18 executive offices are at 23 Hsin Hua Road, and any remaining allegations of Paragraph 3.

19 4. HTC denies the allegations of Paragraph 4.

20 5. HTC admits the allegations of Paragraph 5.

21 6. HTC denies the allegations of Paragraph 6.

22 7. With regard to the allegations of Paragraph 7, which are dependent on Paragraphs 4-  
23 6, HTC denies the same.

24 8. HTC admits that venue is proper in this District under 28 U.S.C. §§ 1391(d) for this  
25 action.

26 **COUNT I - PATENT INFRINGEMENT**

27 9. HTC denies the allegations of Paragraph 9.

28 10. HTC is without sufficient information to form a belief as to the truth or falsity of the

1 allegations in Paragraph 10 and therefore denies same.

2 11. Regarding the allegations of Paragraph 11, HTC admits it received letters on the dates  
3 the allegations of Paragraph 11.

4 12. HTC denies all allegations of Paragraph 12.

5 13. HTC denies all allegations of Paragraph 13.

6 **RESPONSE TO DATAQUILL'S PRAYER FOR RELIEF**

7 The allegations in the paragraph requesting relief are in the nature of prayer. Although no  
8 answer is required, HTC responds to the individual requests for relief as follows:

9 a. HTC denies that DataQuill is entitled to the requested damages and prejudgment and  
10 post-judgment interest and denies any and all liability for DataQuill's claims.

11 b. HTC denies that DataQuill is entitled to the requested enhanced damages and denies  
12 any and all liability for DataQuill's claims.

13 c. HTC denies that DataQuill is entitled to the requested finding that this is an  
14 exceptional case or to the requested attorney's fees and expenses and denies any and all liability for  
15 DataQuill's claims.

16 d. HTC denies that DataQuill is entitled to the requested injunctive relief and denies any  
17 and all liability for DataQuill's claims.

18 e. HTC denies that DataQuill is entitled to any other relief from HTC in this case, denies  
19 that any relief sought by DataQuill is warranted, denies any and all liability for the alleged conduct,  
20 and requests that DataQuill's requested relief be denied.

21 **DEFENSES AND AFFIRMATIVE DEFENSES**

22 **Non-Infringement**

23 1. Upon information and belief, HTC has not infringed and does not infringe any of the  
24 claims of the '304 patent, including the '304 Reexamination Certificate described below, or the '591  
25 patent, including the '591 Reexamination Certificate described below (collective referred to as "the  
26 patents-in-suit"), literally, under the doctrine of equivalents, directly, contributorily, by inducement,  
27 or in any other manner.  
28

**Patent Invalidity**

2. Upon information and belief, each of the claims of the patents-in-suit including those contained in the respective Reexamination Certificates for the '304 and '591 patents is invalid for failing to comply with one or more of the conditions and requirements for patentability as set forth in the United States Patent Laws, Title 35 U.S.C., including specifically §§ 102, 103, 112, and/or 305 (including specifically lack of written description, enablement, best mode, particularly pointing out and/or distinctly claiming, and/or impermissible broadening of claims), and the rules, regulations, and laws pertaining thereto.

**Prosecution History Estoppel or Disclaimer**

3. Because of proceedings in the United States Patent and Trademark Office during the prosecution of the applications that resulted in the patents-in-suit (and related applications), and prosecution of the reexaminations of the patents-in-suit, as shown by the prosecution histories thereof, DataQuill is estopped to claim a construction of the patents-in-suit that would cause any valid claim thereof to cover or include any products that are or have been manufactured, used, sold, imported, or offered for sale by HTC, either literally or under the doctrine of equivalents.

4. DataQuill is estopped by reason of prosecution history estoppel from asserting infringement of the claims of the patents-in-suit including the claims of the Reexamination Certificates under the doctrine of equivalents.

**License**

5. Upon information and belief and after reasonable opportunity for discovery, the relief sought by DataQuill based on HTC's alleged infringement of the patents-in-suit is barred in whole or in part to the extent that HTC is directly or indirectly licensed to practice the patents-in-suit, either expressly or impliedly.

**Inequitable Conduct**

6. Upon information and belief, DataQuill's allegations of infringement of the patents-in-suit are barred because the patents-in-suit are unenforceable pursuant to 37 C.F.R. § 1.56 and the doctrine of inequitable conduct. The bases for and specifics of HTC's inequitable conduct defense are set forth in more detail in HTC's declaratory judgment count seeking a declaration that the

1 claims of patents-in-suit, including those contained within the respective Reexamination Certificates  
2 for the '304 and '591 patents, are unenforceable based on DataQuill's inequitable conduct in the  
3 procurement of those patents.

4 **No Irreparable Harm**

5 7. DataQuill is not entitled to injunctive relief because any injury to DataQuill as a result  
6 of HTC's alleged activities is not immediate or irreparable, and DataQuill has an adequate remedy at  
7 law.

8 **Intervening Rights**

9 8. DataQuill's claims are limited or barred by intervening rights under 35 U.S.C. §§  
10 307(b) and 252.

11 **Damages Barred by Lack of Notice and Failure to Mark**

12 9. Upon information and belief, DataQuill is barred in whole or in part from recovering  
13 damages by operation of 35 U.S.C. § 287. The averments of this paragraph are likely to have  
14 evidentiary support after HTC has had a reasonable opportunity for further investigation and  
15 discovery.

16 **Time Limitation on Damages**

17 10. DataQuill is barred in whole or in part from recovering damages by operation of 35  
18 U.S.C. § 286.

19 **Laches**

20 11. DataQuill is estopped from asserting the patents-in-suit against HTC to the extent that  
21 HTC unreasonably delayed in filing suit against HTC.

22 **No Costs**

23 12. Upon information and belief, DataQuill is precluded from seeking recovery of its  
24 costs under the provisions of 35 U.S.C. § 288.

25 13. WHEREFORE HTC prays that this Court dismiss DataQuill's action and enter  
26 judgment that DataQuill take nothing on its claims against HTC and award HTC its attorney's fees  
27 and costs of defending this action and such other and further relief as it may be entitled.  
28

**COUNTERCLAIMS****Parties**

1. HTC Corporation ("HTC") is a corporation organized under the laws of the Republic of China, with executive offices as No. 23 Xinghua Rd., Taoyuan 330, Taiwan, R.O.C.

2. Upon information and belief, Plaintiff DataQuill Limited ("DataQuill") is a limited company organized and existing under the laws of the British Virgin Islands, having its principal place of business in Tortola, British Virgin Islands.

**Jurisdiction and Venue**

3. This Court has subject matter jurisdiction over HTC's counterclaims pursuant to 28 U.S.C. §§ 2201-2202, 1338 and 1331. A real, immediate, and justiciable controversy exists between HTC and DataQuill. The controversy relates to the invalidity, non-infringement, and unenforceability of the patents-in-suit. DataQuill has accused HTC of infringing the patents-in-suit.

4. As the plaintiff in the above-captioned lawsuit, DataQuill has consented to jurisdiction and venue in this Court.

5. On November 27, 2006, an *Ex Parte* Request for Reexamination was filed by a third party with the United States Patent and Trademark Office ("PTO") of all 63 claims originally issued in the '304 patent. The Request for Reexamination was refiled on January 25, 2007, and the PTO assigned it reexamination control number 90/008,340. On April 13, 2007, the PTO determined a substantial new question of patentability existed for all of the issued claims of the '304 patent and ordered reexamination of all claims. The reexamination of the '304 patent resulted in the April 13, 2010 issuance of the Reexamination Certificate entitled "Ex Parte Reexamination Certificate (7454<sup>th</sup>) US 6,058,304 C1" ("the '304 Reexamination Certificate"). During reexamination, DataQuill cancelled or amended each of the independent claims of the '304 patent to add additional limitations; thus, the scope of each of the non-cancelled claims was narrowed during reexamination to overcome prior art. Rather than amending certain claims, DataQuill added new claims of narrowed scope.

6. On December 21 2006, a third party filed, with the PTO, an *Ex Parte* Request for Reexamination of all claims originally issued in the '591 patent. The Request was refiled on January



1 February 9, 2007, and the PTO assigned it reexamination control number 90/008,394. On May 4,  
2 2009, the PTO determined a substantial new question of patentability existed for all of the issued  
3 claims of the '591 patent and ordered reexamination of all claims. The reexamination of the '591  
4 patent resulted in the October 27, 2009 issuance of the Reexamination Certificate entitled "Ex Parte  
5 Reexamination Certificate (7125<sup>th</sup>) US 7,139,591 C1" ("the '591 Reexamination Certificate").  
6 During reexamination, DataQuill amended each of the independent claims of the '591 patent to add  
7 additional limitations; thus, the scope of each of the claims was narrowed during reexamination to  
8 overcome prior art.

### 9 COUNT I

10 (Request for Declaratory Judgment of Non-Infringement of  
11 U.S. Patent No. 6,058,304 including the 7454th Reexamination Certificate  
12 for U.S. Patent No. 6,058,304, issued April 13, 2010)

13 7. HTC re-alleges and incorporates by reference each preceding allegation as though  
14 expressly stated herein.

15 8. HTC has not infringed, contributed to the infringement of, or induced infringement of  
16 any valid and enforceable claim of the '304 patent including those contained within the '304  
17 Reexamination Certificate, either literally or under the doctrine of equivalents.

18 9. Based on statements made by the applicant during prosecution, including  
19 reexamination, of the '304 patent, DataQuill is estopped from asserting that HTC infringes claims of  
20 the '304 patent including claims contained in the '304 Reexamination Certificate.

21 10. Accordingly, HTC seeks a declaratory judgment pursuant to 28 U.S.C. §§ 2201-2202  
22 that the claims of the '304 patent including those contained within the '304 Reexamination  
23 Certificate are not infringed by HTC.

### 24 COUNT II

25 (Request for Declaratory Judgment of Patent Invalidity of  
26 U.S. Patent No. 6,058,304 including the 7454th Reexamination Certificate  
27 for U.S. Patent No. 6,058,304, issued April 13, 2010)

28 11. HTC re-alleges and incorporates by reference each preceding allegation as though  
expressly stated herein.

13. Accordingly, HTC seeks a declaratory judgment pursuant to 28 U.S.C. §§ 2201-2202 that the claims of the '304 patent including those contained in the '304 Reexamination Certificate are invalid.

**(Request for Declaratory Judgment of Non-Infringement of  
U.S. Patent No. 7,139,591 including the 7125th Reexamination Certificate  
for U.S. Patent No. 7,139,591, issued October 27, 2009)**

17. Accordingly, HTC seeks a declaratory judgment pursuant to 28 U.S.C. §§ 2201-2202 that the claims of the '591 patent including those contained in the '591 Reexamination Certificate is not infringed by HTC.



**COUNT IV****(Request for Declaratory Judgment of Patent Invalidity of  
U.S. Patent No. 7,139,591 including the 7125th Reexamination Certificate  
for U.S. Patent No. 7,139,591, issued October 27, 2009)**

18. HTC re-alleges and incorporates by reference each preceding allegation as though expressly stated herein.

19. Upon information and belief, each of the claims in the '591 patent including those contained in the '591 Reexamination Certificate is invalid for failing to comply with the conditions and requirements for patentability as set forth in the United States Patent Laws, Title 35 U.S.C., including specifically §§ 102, 103, 112, and/or 305 (including specifically lack of written description, enablement, best mode, particularly pointing out and/or distinctly claiming, and/or impermissible broadening of claims), and the rules, regulations, and laws pertaining thereto.

20. Accordingly, HTC seeks a declaratory judgment pursuant to 28 U.S.C. §§ 2201-2202 that the claims of the '591 patent including those contained in the '591 Reexamination Certificate are invalid.

**COUNT V****(Request for Declaratory Judgment of Unenforceability of the Patents-in-Suit  
including the Reexamination Certificates for the Patents-in-Suit)**

21. HTC re-alleges and incorporates by reference each preceding allegation as though expressly stated herein.

22. Each individual associated with the filing and prosecution of a patent application has a duty of candor and good faith in dealing with the PTO. That duty includes a duty to disclose to the PTO all information known to that individual to be material to the patentability of the claimed invention. A breach of a patent applicant's duty of candor renders unenforceable all claims which eventually issue from the application in connection with which such breach occurred and all claims that issue from any related applications. A breach of the patent applicant's duty of candor during the original prosecution of an application cannot be purged by a subsequent disclosure during a reexamination proceeding.

1           23. Upon information and belief, DataQuill committed inequitable conduct during the  
2 prosecution of the patents-in-suit by (1) failing to disclose the two-page brochure publicly  
3 distributed at ScanTech; (2) failing to disclose the Glasgow Herald publication; (3)  
4 mischaracterizing the two-page brochure publicly distributed at ScanTech; (4) failing to disclose the  
5 one-page flyer publicly distributed at ScanTech; (5) failing to disclose actions in European  
6 counterpart applications; (6) failing to disclose Garry Robb's '790 patent application and art cited  
7 therein; (7) failing to disclose proper inventorship; and (8) by excerpting and intentionally  
8 withholding an Anticipation Exhibit from an Invalidity Report which contradicted information  
9 submitted by DataQuill regarding patent validity.

10           24. These misrepresentations and omissions by DataQuill were material because  
11 DataQuill failed to disclose non-cumulative invalidating prior art and information regarding that art  
12 that would have by itself or in combination with other information established a prima facie case of  
13 unpatentability of the claims of the patents-in-suit.

14           25. The information withheld by DataQuill was also inconsistent with positions taken by  
15 DataQuill in opposing arguments of unpatentability made by the PTO and arguments of patentability  
16 made by DataQuill.

17           26. Upon information and belief, DataQuill committed these acts with the intent to  
18 deceive the PTO in order to obtain the patents-in-suit.

19           27. Upon information and belief, HTC makes the following allegations with respect to  
20 the prior art that forms the basis of its inequitable conduct claims:

21           **(a) Failure to Disclose the Two-Page Brochure Publicly Distributed at ScanTech**

22           28. United Kingdom patent application no. 9321133 was filed October 13, 1993, in the  
23 name of Garry Robb alone (the "Robb GB application"). On September 27, 1994, a PCT application  
24 -- PCT/GB94/02101 ("the PCT application") -- was filed. The PCT application attempted to claim  
25 priority to the Robb GB application, and was filed as a continuation-in-part of the Robb GB  
26 application, as it added two new inventors (Francis John Callaghan and Paul Marshall Doran), three  
27 new figures (10, 11, and 12), text describing the same, and added references to "cellular" throughout  
28 the specification, *inter alia*. The PCT application designated the U.S., was nationalized in the U.S.,

1 and became the '304 patent once issued. Upon information and belief, the asserted claims are not  
2 supported by the Robb GB application pursuant to 35 U.S.C. § 112, and the priority claim in the  
3 PCT application to the Robb GB application is improper under 35 U.S.C. § 119. *See also* 35 U.S.C.  
4 § 119(a) (no patent shall be granted on an application described in a printed publication in any  
5 country more than one year before the date of filing in this country).

6 29. Before filing the PCT application leading to the '304 patent, named inventor Garry  
7 Robb formed a company called Winfair Systems, upon information and belief. Upon information  
8 and belief, personnel involved with Winfair Systems prepared a two-page brochure to market a  
9 prototype device, referred to as a "DataQuill" "pen" because of its pen-like shape. Upon  
10 information and belief, the two-page brochure was publicly distributed in a double-sided copy on A4  
11 paper. Specifically, named inventor Garry Robb and others including Jan Orkisz publicly distributed  
12 approximately 250-300 brochures at a trade show, called "ScanTech," held at the National  
13 Exhibition Centre in Birmingham, England, on or about June of 1992, on information and belief.  
14 The ScanTech trade show was an exhibition directed to those interested in bar code scanning  
15 technology and was described in the Glasgow Herald at the time as being regarded by those in the  
16 business as the most important scanning technology exhibition in the world.

17 30. Upon information and belief, Mr. Robb was aware of the prior publication of the two-  
18 page brochure because he was instrumental in the public distribution of that brochure at ScanTech.  
19 The public distribution of that brochure in June of 1992 was more than one year before the filing of  
20 the PCT application on September 27, 1994, and more than one year before the filing of the Robb  
21 GB patent application on October 13, 1993. Thus, the prior publication of the two-page brochure is  
22 prior art under 35 U.S.C. § 102(b) regardless of whether the priority claim to the Robb GB  
23 application was proper. Further, the two-page brochure was material to patentability of the claims of  
24 the application leading to the '304 patent; for instance, the two-page brochure anticipates at least  
25 claims 29 and/or 31 of the '304 patent. But, Mr. Robb failed to disclose the two-page brochure to  
26 the USPTO during the prosecution of the '304 patent, upon information and belief. It would have  
27 been important to a reasonable examiner to know of the prior publication of the two-page brochure  
28 when examining the claims of the application leading to the '304 patent. The high degree of

1 materiality creates an inference that the failure to disclose was intentional, rendering each claim of  
2 the '304 patent and the '304 Reexamination Certificate unenforceable.

3 **(b) Failure to Disclose the Glasgow Herald Publication**

4 31. On August 25, 1992, in Glasgow, Scotland, the Glasgow Herald published an article  
5 entitled "Winfair Launches Two-Way Bar Code Reader," showing a pen-shaped device reading a bar  
6 code ("the Glasgow Herald article"). The article paraphrased Mr. Robb's comments to a Glasgow  
7 Herald reporter with respect to his involvement with Winfair Systems and the DataQuill pen-shaped  
8 device. The Glasgow Herald article was published more than one year prior to the September 27,  
9 1994 filing of the PCT application, and more than a year prior to the October 13, 1993 filing of the  
10 Robb GB application; and thus, constituted prior art under 35 U.S.C. §102 regardless of whether the  
11 priority claim under 35 U.S.C. § 119 to the Robb GB application was proper. *See also* 35 U.S.C. §  
12 119(a) (no patent shall be granted on an application described in a printed publication in any country  
13 more than one year before the date of filing in this country).

14 32. It would have been important to a reasonable examiner to be informed that the named  
15 inventor Robb had publicly disclosed the subject matter of the claimed invention via the Glasgow  
16 Herald article describing the DataQuill pen-shaped device more than one year before filing the Robb  
17 GB application and/or the PCT application. Upon information and belief, at least Mr. Robb was  
18 aware of the Glasgow Herald article, having been interviewed for the article, and intentionally failed  
19 to disclose the article to the USPTO during prosecution of the '304 patent. Further, combining the  
20 Glasgow Herald Publication with the two-page brochure discussing the same device and the same  
21 ScanTech tradeshow would have rendered at least claims 29 and/or 31 obvious under 35 U.S.C.  
22 §103. The high degree of materiality of the Glasgow Herald article creates an inference that Mr.  
23 Robb possessed intent to withhold this information from the USPTO. Mr. Robb's intentional failure  
24 to disclose this material information to the USPTO constituted inequitable conduct and renders each  
25 claim of the '304 patent and the '304 Reexamination Certificate unenforceable.

26 **(c) Mischaracterization of Two-Page Brochure Publicly Distributed at ScanTech**

27 33. The '591 patent issued from patent application 10/869,215, which was a continuation  
28 of application 09/548,565, which was a continuation of the application leading to the '304 patent.

1 The '591 application similarly includes a claim to priority to the Robb GB application; however,  
2 since the asserted claims of the '591 application are not supported by the Robb GB application under  
3 35 U.S.C. § 112, the priority claim under 35 U.S.C. § 119 to the Robb GB application is improper.

4 34. On March 30, 2005, Mr. Jan Orkisz was deposed in the case of *DataQuill v. Kyocera*,  
5 then pending in the U.S. District Court for the Southern District of California. At his deposition, Mr.  
6 Orkisz testified that he and Mr. Robb publicly distributed at the ScanTech exhibition, described  
7 above, the *two-page* brochure (Orkisz deposition exhibit 93) depicting a DataQuill pen-shaped  
8 device and containing marketing information.

9 35. Unlike the prosecution of the '304 patent in which the two-page brochure was never  
10 cited to the USPTO by DataQuill, DataQuill did submit the two-page brochure during the  
11 prosecution of the '591 patent. On September 19, 2005, just months after Mr. Orkisz's testimony,  
12 DataQuill's counsel, Joseph Hetz of the Brinks Hofer law firm, filed an Information Disclosure  
13 Statement ("IDS") submitting the two-page brochure to the USPTO, *inter alia*. However, upon  
14 information and belief, DataQuill's counsel mischaracterized the nature of the document that Mr.  
15 Orkisz had testified that he and Mr. Robb had publicly distributed at ScanTech. In the IDS,  
16 DataQuill's patent prosecution counsel Hetz represented to the USPTO that the document that had  
17 been publicly distributed at ScanTech in June of 1992 was a *one-page* flyer, not the *two-page*  
18 brochure that was publicly distributed according to Mr. Orkisz's testimony. DataQuill's patent  
19 prosecution counsel Hetz submitted the *one-page* flyer to the USPTO, identified it as "Document  
20 C88" and characterized it by stating:

21 Document C88 includes a copy of Winfair Systems (Scotland) Limited  
22 flyers believed based on present investigation and recollection of  
23 events to have been made available to attendees at a trade show  
24 exhibition in the United Kingdom in June 1992. Mr. Garry Robb was  
25 a principle [sic] of Winfair Systems.

26  
27 September 19, 2005 IDS.  
28



1           36. With respect to the *two-page* brochure, however, that Mr. Orkisz testified to having  
2 distributed with Mr. Robb at ScanTech, DataQuill's counsel Mr. Hetz only stated in the IDS: "In  
3 addition, Document C111 is a copy of two-sided Winfair System flyers, which flyers are *believed* to  
4 have been *made* in 1992." *Id.* (emphasis added).

5           37. By mischaracterizing the two-page brochure as "believed to have been made" by  
6 Winfair Systems (Scotland), *instead of having actually been made and distributed* publicly more  
7 than a year before the filing of the application leading to the '304 patent, and doing so months after  
8 receiving Orkisz's testimony directly to the contrary, DataQuill's counsel committed an omission of  
9 material information during prosecution of the application for the '591 patent. Upon information  
10 and belief, that material omission implied to the USPTO that the two-page brochure was not prior  
11 art.

12           38. Upon information and belief, at least DataQuill's patent prosecution counsel Hetz and  
13 Mr. Robb were aware of the two-page brochure and of Mr. Robb's and Mr. Orkisz's public  
14 distribution of the two-page brochure, either based on personal knowledge or via Mr. Orkisz's  
15 testimony.

16           39. It would have been important to a reasonable examiner to know that the detailed two-  
17 page brochure was publicly disseminated to the relevant public more than a year prior to the filing of  
18 the Robb GB application, to which both the '304 and '591 patents attempted to claim priority, and  
19 more than one year prior to the filing of the PCT application that became the '304 patent, to which  
20 the '591 patent claimed priority. Further, the two-page brochure anticipates at least claim 1 of the  
21 '591 patent. Thus, the publicly disclosed *two-page* brochure was prior art under 35 U.S.C. § 102(b)  
22 regardless of whether the priority claim to the Robb GB application was proper, and material to the  
23 patentability of the claims of the '591 patent. With this high degree of materiality, intent can be  
24 inferred, and each claim of the '591 patent and '591 Reexamination Certificate is unenforceable.

25           **(d) Failure to Disclose the One-Page Flyer Publicly Distributed at ScanTech**

26           40. During prosecution of the application leading to the '591 patent, after Mr. Hetz  
27 submitted IDS on September 19, 2005 containing the mischaracterization of the two-page brochure,  
28 as discussed in paragraphs 31-37 above, Mr. Robb was re-deposed in the *DataQuill v. Kyocera* case



1 on October 26, 2005. In that deposition, Mr. Robb testified that he publicly distributed at least  
2 twenty copies of the one-page flyer to interested attendees at ScanTech in June of 1992. However,  
3 Mr. Robb failed to disclose the one-page flyer to the USPTO during the prosecution of the  
4 application leading to the '304 patent, upon information and belief. Examples of the materiality of  
5 the one-page flyer include that: the one-page flyer, in combination with the Glasgow Herald article  
6 discussed above, renders obvious at least claim 29 and/or 31 of the '304 patent; and, the one-page  
7 flyer alone anticipates at least claim 31 of the '304 patent. With this high degree of materiality,  
8 intent can be inferred, and each claim of the '304 patent and '304 Reexamination Certificate is  
9 unenforceable.

10 **(e) Failure to Disclose Actions, Including Priority Date Challenges,**  
11 **in European Counterpart Applications**

12 41. Upon information and belief, the '591 patent is unenforceable because, during  
13 prosecution of the application for the '591 patent, DataQuill committed inequitable conduct by  
14 failing to disclose to the USPTO materials relating to proceedings concerning European counterpart  
15 applications to the '304 and '591 patents-in-suit.

16 42. DataQuill filed two European counterpart applications to the patents-in-suit, both of  
17 which also included a priority claim to the Robb GB application: EP Application 94927728.9 (the  
18 "EP parent application," revoked by the European Patent Office ("EPO") on February 21, 2005) and  
19 EP98200196.8 ("the EP divisional application"). Third parties filed "Oppositions" against the  
20 issuance of the claims in each EP application. (An EPO Opposition is a proceeding in which third  
21 parties can oppose the issuance of a patent, somewhat akin to a reexamination request in the U.S.  
22 filed after the patent issues.) The EPO considered and responded to those Oppositions.

23 43. Three third parties lodged separate Oppositions to the EP divisional application –  
24 Philips (May 19, 2004), Nokia (June 24, 2004), and Alcatel (June 23, 2004). Each Opposition relied  
25 upon various prior art references and also challenged the EP divisional application's priority date  
26 claim to the October 13, 1993 filing date of the Robb GB application (discussed above). Each  
27 Opposition argued that the priority date of the EP divisional application should be limited to  
28 September 27, 1994 and that the priority date claim to October 13, 1993 was improper. The EPO

1 subsequently sustained this priority challenge. Nevertheless, throughout the prosecution of the U.S.  
2 patent application leading to the '591 patent, DataQuill maintained that it was entitled to claim  
3 priority to the Robb GB application. In contravention of MPEP 2001.06 and MPEP 2001.06(a),  
4 throughout prosecution of the application leading to the '591 patent (issued November 21, 2006),  
5 DataQuill, the listed inventors, and their patent prosecution counsel, upon information and belief,  
6 failed to inform the USPTO of the challenges to the priority date in the Oppositions and the bases  
7 therefore.

8 44. Upon information and belief, at least named inventors Doran and Callaghan and  
9 DataQuill's patent prosecution counsel Mark Milhench were aware of the Oppositions and the  
10 priority date challenges. For example, each opposition was prosecuted on behalf of DataQuill, and  
11 primarily by Mr. Milhench. In the prosecution of the EP parent application, while responding to the  
12 Oppositions, DataQuill's foreign associate requested an extension of time to reply to Oppositions  
13 because of Mr. Milhench's transfer from a former firm to Mintz Levin Cohn Ferris Glovsky and  
14 Popeo Intellectual Property, LLP ("Mintz Levin"), and to consult with named inventors Frank  
15 Callaghan and Paul Doran. Specifically, in a letter to the EPO dated 8 September 2004, Mintz Levin  
16 stated:

17 The respondent's principal contact, Mr. Frank Callaghan, was advised  
18 at the beginning of August by Mr. Milhench that he would be leaving  
19 Jenkins. ... Mr. Callaghan subsequently concurred with his business  
20 partner, Mr. Paul Doran, on Mr. Doran's return from holiday and with  
21 his legal advisors in the USA who are currently litigating the  
22 corresponding US patent, and decided to transfer responsibility for the  
23 respondent's patent portfolio from Jenkins to ourselves [Mintz Levin]  
because Mr. Milhench has been involved with the DataQuill patent  
portfolio since 1997. ... A further point to note is that as the  
respondent is currently litigating his corresponding US patent any  
reply prepared by ourselves should be reviewed by the respondent's  
US advisors prior to filing, and in the time available this is clearly  
impossible.

24 Upon information and belief, Mr. Callaghan and Mr. Doran were similarly consulted in the  
25 prosecution of the EP divisional application.

26 45. Upon information and belief, at least Mr. Doran, Mr. Callaghan, and Mr. Milhench  
27 and associates at Mintz Levin knew of the proceedings in the counterpart EP applications and knew  
28

1 that information concerning those proceedings was material to the prosecution of the pending  
2 application leading to the '591 patent.

3 46. Further, upon information and belief, DataQuill's U.S. patent attorney knew of the  
4 existence of the Oppositions filed in the EP counterpart application and was also aware of the duty to  
5 disclose material information from foreign counterpart applications.

6 47. For example, in an Information Disclosure Statement ("IDS") filed on October 1,  
7 2004 in the prosecution of the U.S. patent application leading to the '591 patent, attorney Joseph  
8 Hetz of the Brinks Hoffer Gilson and Lione law firm submitted, to the USPTO, an Office Action  
9 (and an English translation thereof) issued by the Japanese Patent Office in a Japanese counterpart  
10 application to the '304 patent. Mr. Hetz also submitted, to the USPTO, copies of prior art references  
11 cited in a Japanese Office Action and stated "Applicants also note that [prior art reference]  
12 documents A134-A138 were cited in an Official Action in a Japanese patent application  
13 corresponding to parent U.S. Patent No. 6,058,304. A copy of an English translation of that Official  
14 Action is enclosed as document A251." Oct. 1, 2004 IDS at 2. By doing so, DataQuill's counsel  
15 demonstrated that it understood the materiality of foreign counterpart patent applications, office  
16 actions, and prior art cited therein and demonstrated that it understood its duty to disclose that  
17 material information to the USPTO.

18 48. However, when submitting information relating to the European counterpart  
19 applications to the USPTO, DataQuill's counsel Hetz submitted only the docket sheets from those  
20 EP applications and not material underlying documents from those EP applications, such as  
21 documents reflecting the challenges to the priority date in the EP Oppositions mentioned above. In  
22 connection with filing a September 19, 2005 IDS in the application leading to the '591 patent,  
23 DataQuill's counsel Hetz submitted the docket sheets and stated:

24 Regarding documents C1-C235, multiple of these documents were  
25 either identified by Kyocera or DataQuill, and/or ... identified as  
26 additional information in EPO proceedings concerning counterpart  
27 patent applications. ... Documents C181 and C182 are online docket  
28 sheets of the EPO proceedings.

1 Sept. 19, 2005 IDS at 2. However, upon information and belief, attorney Hetz remained completely  
2 silent that any Opposition proceedings had taken place and that the priority claim was being  
3 questioned.

4 49. It would have been important to a reasonable USPTO examiner examining the  
5 application leading to the '591 patent that the priority date of the EP counterpart application was  
6 being challenged, because that priority date challenge would impact the priority date for the U.S.  
7 application leading to the '591 patent, which also purports to claim priority therefrom. A U.S. patent  
8 application's claim for priority is highly material to the patentability of what the application claims  
9 to be the invention because a priority date defines the temporal scope of the prior art and,  
10 accordingly, may determine validity, whether an issue arises in prosecution or later in court  
11 challenges to validity. The challenge to the priority date in the EP divisional application refutes or,  
12 at the least, is inconsistent with the position that DataQuill takes in asserting that the U.S. application  
13 leading to the '591 patent was proper. It would have been important to a reasonable examiner to  
14 consider the arguments concerning the priority date in the EP Oppositions.

15 50. Thus, upon information and belief, Mr. Callaghan, Mr. Doran, and Mr. Hetz withheld  
16 from the USPTO material information concerning the Oppositions in the European divisional  
17 application, including information concerning the priority date challenges. Based on this showing of  
18 materiality, intent can be inferred, and each claim of the '591 patent and '591 Reexamination  
19 Certificate is unenforceable.

20 **(f) Failure to Disclose Garry Robb's '790 Patent Application and Art Cited Therein**

21 51. On July 16, 1998, Garry Robb filed U.S. Patent Application S/N 09/101,790 ("the  
22 Robb '790 application") (now U.S. Patent No. 6,177,950 in his own name. The Robb '790  
23 application included disclosure and claims that were closely related to the disclosures of the '304  
24 and '591 patents-in-suit. More specifically, the specification of each of the Robb '790 application  
25 and '304 and '591 patents discloses a device having a display, a reading sensor, and a  
26 telecommunications interface, for example. As an example of claim similarity, during the  
27 prosecution of the Robb '790 application, Mr. Robb added claim 30 in a preliminary amendment  
28 filed on July 16, 1998. Claim 30 was directed to:

1 [a] personal communication device, comprising: a display for  
2 displaying data and video signals; a loudspeaker for generating an  
3 audible signal; a microphone for receiving an audio signal; a keypad  
4 for entering data, a telecommunications interface for receiving and  
transmitting information; and an integral adjustable reading head for  
producing an image signal.

5 Claims of the '304 patent, including claims that DataQuill alleges HTC's products to infringe,  
6 include substantially similar limitations. For example, claim 1 of the '304 patent calls for "[a] data  
7 entry device" comprising "a display," the data entry device being integral with a cellular telephone  
8 (microphone and loudspeaker), a "reading sensor," "communications interface," and a "reading  
9 sensor," *inter alia*. Accordingly, since at least as of July 16, 1998, the claims of the Robb '790  
10 application could have conceivably served as the basis of a double patenting rejection in the  
11 prosecution of the patents-in-suit; therefore, the existence of the Robb '790 application was highly  
12 material to patentability of the '304 patent.

13 52. Further, during the prosecution of the Robb '790 application, in an Office Action  
14 dated October 27, 1999, examiner Ramakrishnaiah rejected claim 30 and others as obvious over  
15 GB2289555A in view of U.S. Patent No. 5,436,654 (dated Feb. 7, 1994), *inter alia*. On April 26,  
16 2000, applicants to the Robb '790 application limited claim 30 by narrowing the scope in an attempt  
17 to avoid the prior art references. The fact that examiner Ramakrishnaiah rejected claim 30 and  
18 others on the basis of prior art was material to the prosecution of the '304 patent for at least two  
19 reasons.

20 53. First, as demonstrated by claim 30, for example, at least some claims of the Robb  
21 '790 application were substantially similar to claims of the '304 patent. By prosecuting the claims  
22 of the '304 patent, DataQuill was necessarily asserting to the USPTO that those claims were  
23 patentable. However, the USPTO's rejection of a substantially similar claim, such as claim 30 of the  
24 '790 Robb application, refutes and is inconsistent with this position. Such a contrary decision by  
25 another USPTO examiner reviewing a substantially similar claim was highly material to the  
26 prosecution of the '304 patent.

27 54. Second, the prior art rejection of claim 30 and others would have been important to  
28 the Examiner of the application leading to the '304 patent, because Mr. Robb's response of



1 narrowing the scope of the claims in place of asserting any claim to priority such as to the Robb GB  
2 application at least call into question the viability of the priority claim for the patents-in-suit.

3 55. Other prior art considered by the USPTO during prosecution of the Robb '790  
4 application also was material to the examination of the pending claims of the claims of the  
5 applications leading to the patents-in-suit. For example, one prior art reference cited during the  
6 prosecution of the Robb '790 application was U.S. Patent No. 5,491,507 to Umezawa ("Umezawa").  
7 Umezawa disclosed a portable handheld computer that could include an integrated camera. Upon  
8 information and belief, this reference would have been important to a reasonable examiner  
9 examining the application leading to the '304 patent for at least the reason that the '304 patent  
10 contains claims directed to a hand holdable unit that includes an integrated camera, such as claims  
11 13, 45, and 46. Further, the USPTO has already determined that "a reasonable examiner would  
12 consider the above prior references [including the Umezawa patent] important, alone or in  
13 combination as stated in the Request, in making a decision as to the patentability of claims 1-62 of  
14 the '591 patent" in an Order dated May 4, 2007, in application control number 90/008,394  
15 (reexamination of the '591 patent), at pp. 2-3. The claims of the '591 patent are patentably indistinct  
16 from those of the '304 patent.

17 56. Upon information and belief, at least Mr. Robb withheld the existence of the Robb  
18 '790 application from the USPTO examiner who evaluated the applications leading to the patents-in-  
19 suit. The existence of the Robb '790 application, examiner Ramakrishnaiah's rejections of the  
20 claims, and prior art cited during prosecution of the '790 application each would have been  
21 important to a reasonable examiner examining the applications leading to the '304 patent.

22 57. At least Mr. Robb (and possibly others involved in prosecuting the application  
23 leading to the '304 patent) failed to satisfy his duty of disclosure to the USPTO by intentionally  
24 withholding the material information described above, upon information and belief. USPTO rules  
25 provide that "[i]ndividuals ... cannot assume that the examiner of a particular application is  
26 necessarily aware of other applications which are 'material to patentability' of the application in  
27 question, but must instead bring such other applications to the attention of the examiner." Manual of  
28 Patent Examination Procedure ("MPEP") 2001.06(b). The showing of materiality of the withheld



1 information creates an inference that the failure to disclose the Robb '790 application and the prior  
2 art cited therein was intentional. This intentional failure to disclose highly material information to  
3 the USPTO during prosecution of the application leading to the '304 patent constituted inequitable  
4 conduct, rendering each claim of the '304 patent and the '304 Reexamination Certificate  
5 unenforceable.

6 **(g) Failure to Disclose Proper Inventorship**

7 58. Upon information and belief, personnel at the University of Edinburgh, Jimmy  
8 Johnstone and Rainer Thonnes, contributed to the conception of the subject matter of the alleged  
9 invention of each of the patents-in-suit by their collaboration with Mr. Robb on a device for barcode  
10 scanning. For example, software and/or firmware would have been necessary to practice even a  
11 single embodiment of the alleged inventions of the '304 and '591 patents. It was at least Mr.  
12 Thonnes who worked for almost five years in an effort to create such software and/or firmware for  
13 DataQuill's pen-shaped prototype device, upon information and belief. Upon information and  
14 belief, Mr. Thonnes contributed to the conception of the subject matter related to the  
15 software/firmware in the pen in an effort to cause the controller to be responsive to a command to  
16 cause downloading of information from a remote processing center for updating information  
17 previously stored in the data entry device, as is claimed in '304 patent 1 and 2 (and claims dependent  
18 therefrom) and '591 patent claims 61 and 62. Upon information and belief, Mr. Johnstone  
19 contributed to the conception of the subject matter related to the "telecommunications interface"  
20 claimed in at least claims 1 and 2 of the '304 patent (and claims dependent therefrom) and claim 1 of  
21 the '591 patent. Upon information and belief, others in the United Kingdom, including Alec Tait,  
22 Jan Orkisz, and Anthony Hopkin, contributed to the conception of the subject matter of at least one  
23 claim of each of the patents-in-suit, including the software for the telecommunications interface of at  
24 least claims 1 and 2 of the '304 patent (and claims dependent therefrom) and claim 1 of the '591  
25 patent.

26 59. Further, upon information and belief, Mr. Stephen Patton formed DataQuill Limited  
27 with co-founder Garry Douglas Robb. While a student at the University of Paisley, Mr. Patton held  
28 the principal technical position and developed the hand-held bar code reader related to the '304

1 patent. Upon information and belief, Mr. Patton contributed to the subject matter of the patents-in-  
2 suit.

3 60. The proper identity of inventors is material to patentability, since a patent cannot  
4 issue if the named inventors did not invent the subject matter sought to be patented under 35 U.S.C.  
5 § 102(f). It would have been important to a reasonable examiner to be informed that the inventive  
6 entity named on the application leading to each of the '304 and '591 patents-in-suit was incorrect.  
7 The high degree of materiality of the identification of proper inventorship creates an inference that  
8 the misrepresentation of inventorship to the USPTO was intentional. Moreover, upon information  
9 and belief, at least named inventor Robb was aware of the inventive contributions of Mr. Johnstone,  
10 Prof. Thonnes, Mr. Tait, Mr. Orkisz, Mr. Hopkin and/or Mr. Patton because of his collaboration with  
11 those individuals, and Mr. Robb intentionally withheld disclosure of the contributions of any and all  
12 of those omitted inventors to the USPTO during prosecution of the applications for both the '304 and  
13 '591 patents. Therefore Mr. Robb committed inequitable conduct, and, as a result, each claim of the  
14 '304 patent and '304 Reexamination Certificate and each claim of the '591 patent and '591  
15 Reexamination Certificate is therefore unenforceable.

16 **(h) Failure to Disclose Invalidity/Anticipation Charts from Kyocera Case**

17 61. In the prior *DataQuill v. Kyocera* case mentioned above, upon information and belief,  
18 DataQuill obtained received a supplemental expert report submitted by Kyocera's technical expert  
19 Royce Fletcher, which contained Mr. Fletcher's expert opinion that the claims the '304 patent were  
20 invalid on the basis of certain prior art references. This supplemental expert report was dated  
21 August 5, 2005 ("August 5, 2005 Invalidity Report"). On information and belief, the August 5, 2005  
22 Invalidity Report consisted of the following: a 4-page report (numbered SUP\_1-4); an Anticipation  
23 Exhibit (pages ANT\_SUP1-67) (the "Anticipation Exhibit"); a 38-page Obviousness Exhibit (page  
24 numbers OBV\_SUPP 1-38); a 3-page exhibit on one of skill in the art (numbered IMP\_SUP 1-3); a  
25 supplementation of documents reviewed (numbered DOC\_SUP 1-2); and two attachments  
26 (Attachment I and Attachment II).

27 62. The Anticipation Exhibit included numerous pages of detailed claim charts explaining  
28 how references, including the following, anticipated the claims of DataQuill's '304 patent: U.S.

1 Patent No. 5,465,401 to Thompson; a prior art device referred to as the EO Personal Communicator  
2 as described in the book *AT&T EO Personal Communicator: The Digital Nomad's Guide*, (1993);  
3 and the publication of the Winfair materials (described above), upon information and belief. The  
4 Anticipation Exhibit is expressly referenced in the Invalidity Report, at page SUP\_2 for example.

5 63. DataQuill's attorney Joseph Hetz submitted an Information Disclosure Statement  
6 ("IDS") dated September 19, 2005, to the USPTO during the prosecution of the application leading  
7 to the '591 patent. In that IDS, Mr. Hetz submitted several pleadings and documents from various  
8 technical experts, including a document from DataQuill's technical expert, Edward Koch, presenting  
9 *inter alia* DataQuill's position that claims of the '304 patent were valid. Among those documents  
10 that Mr. Hetz submitted was "Edward Koch's Rebuttal to Certain New Contentions Raised by  
11 Kyocera, dated 06/23/05, numbered PX12-1-8," as IDS entry number C45 (referred to hereinafter as  
12 the "Koch Rebuttal"). In the Koch Rebuttal, DataQuill's expert Mr. Koch opined that claims of the  
13 '304 patent were not invalidated by the Thompson '401 patent, by the AT&T EO personal  
14 communicator, or the Winfair documents.

15 64. Also buried within the numerous pages of references on the IDS was the listing C168:  
16 "*Excerpts* of Supplemental Expert Report of Royce W. Fletcher relating to validity, Kyocera  
17 Wireless, dated 08/05/05, SUP-1 to -4; OBV\_SUP-1 to -38; IMP\_SUP-1 to -3; DOC\_SUP-1 to -2;  
18 Attachment I; Attachment II." (emphasis added). Upon information and belief, DataQuill  
19 intentionally excerpted and omitted the Anticipation Supplement from submission to the USPTO,  
20 despite DataQuill's submission of other selected materials from Mr. Fletcher.

21 65. Given that DataQuill submitted what appear to be the complete opinions of its own  
22 expert Mr. Koch regarding the validity of claims of the '304 patent, the complete opinions of  
23 Kyocera's opposing expert Mr. Fletcher on the same issue would have been material to the  
24 examination of the pending claims of the related application leading to the '591 patent. Therefore,  
25 DataQuill's intentional failure to disclose the Anticipation Exhibit (indeed its excerption of the  
26 Anticipation Exhibit from the Invalidity Report), at least through attorney Hetz, during prosecution  
27 of the application leading to the '591 patent constituted inequitable conduct, rendering each claim of  
28 the '591 patent unenforceable.

**(i) Infectious Unenforceability**

68. In light of the foregoing, accordingly, HTC seeks a declaratory judgment pursuant to 28 U.S.C. §§ 2201-2202 that each of the claims of the '304 patent and '304 Reexamination

1 Certificate and each of the claims of the '591 patent and '591 Reexamination Certificate is  
2 unenforceable.

3 **COUNT VI**

4 **(Request for Attorneys Fees and Costs)**

5 69. HTC re-alleges and incorporates by reference each preceding allegation as though  
6 expressly stated herein.

7 70. HTC is entitled to a declaration that this is an "exceptional" case within the meaning  
8 of 35 U.S.C. § 285, entitling HTC to an award of its reasonable and necessary attorneys' fees,  
9 expenses, and costs incurred in this action.

10 **JURY DEMAND**

11 71. Under Rule 38(b) of the Federal Rules of Civil Procedure, HTC respectfully requests  
12 a jury trial on all issues and claims.

13 **PRAYER FOR RELIEF**

14 WHEREFORE, HTC prays for judgment against DataQuill, and that the Court award the  
15 following relief:

16 A. Declare that HTC has not infringed, has not contributed to infringement of, and has  
17 not induced infringement of any claim of the '304 patent, the '304 Reexamination Certificate, the  
18 '591 patent, or the '591 Reexamination Certificate, either literally or under the doctrine of  
19 equivalents;

20 B. Declare that the claims of the '304 patent and of the '304 Reexamination Certificate  
21 and that the claims of the '591 patent and the '591 Reexamination Certificate are invalid;

22 C. Declare that the claims of the '304 patent and of the '304 Reexamination Certificate  
23 and that the claims of the '591 patent and the '591 Reexamination Certificate are unenforceable;

24 D. Declare this case exceptional under 35 U.S.C. § 285 and award HTC its reasonable  
25 attorneys' fees, expenses and costs incurred in this action; and  
26  
27  
28

1 E. Award HTC such other and further relief as this Court deems just and proper.

2 Dated: July 8, 2010

3 Respectfully submitted,

4 **WILSON TURNER & KOSMO LLP**

5  
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14 **HTC CORPORATION**